

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MARY ELIZABETH B.,

Plaintiff,

v.

3:18-CV-457(TWD)

NANCY A. BERRYHILL, Acting Commissioner
of Social Security,

Defendant.

APPEARANCES:

OF COUNSEL:

LACHMAN & GORTON LAW OFFICE
For Plaintiff
PO Box 89
1500 East Main Street
Endicott, NY 13761

PETER A. GORTON, ESQ.

HON. GRANT JAQUITH
United States Attorney
For Defendant
100 S. Clinton St.
PO Box 7198
Syracuse, NY 13261-7198

ANDREA L. LECHLEITNER, ESQ.
Special Assistant

THÉRÈSE WILEY DANCKS, United States Magistrate Judge

ORDER

Presently before the Court in this action, in which Plaintiff seeks judicial review of an adverse administrative determination by the Commissioner, pursuant to 42 U.S.C. §405(g), are cross-motions for judgment on the pleadings.¹ Oral argument was conducted in connection with

¹ This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order, once issue has been joined, an action such as this is considered procedurally as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

those motions on May 14, 2019, during a telephone conference at which a court reporter was present. At the close of argument I issued a bench decision in which, after applying the requisite deferential review standard, I found the Commissioner's determination resulted from the application of proper legal principles and was supported by substantial evidence, and I provided further detail regarding my reasoning and addressing the specific issues raised by the Plaintiff in his appeal.

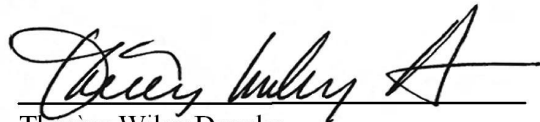
After due deliberation, and based up the Court's oral bench decision, which has been transcribed, is attached to this Order and is incorporated in its entirety by reference herein, it is hereby,

ORDERED, as follows:

- (1) Defendant's motion for judgment on the pleadings is **GRANTED**;
- (2) The Acting Commissioner's determination that Plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is **AFFIRMED**; and
- (3) The Clerk is directed to enter judgment, based upon this determination, dismissing Plaintiff's complaint in its entirety.

SO ORDERED.

Dated: May 28, 2019
Syracuse, New York


Therèse Wiley Dancks
United States Magistrate Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
MARY-ELIZABETH B.,

Plaintiff,

-v-

3:18-CV-457

BERRYHILL,

Defendant.
-----x

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE THERESE WILEY DANCKS
May 14, 2019
100 South Clinton Street, Syracuse, New York

For the Plaintiff:
(Appearance by telephone)

LACHMAN & GORTON LAW OFFICE
P.O. Box 89
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BY: **PETER A. GORTON, ESQ.**

For the Defendant:
(Appearance by telephone)

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Hannah F. Cavanaugh, RPR, CSR, NYACR
Official United States Court Reporter
100 South Clinton Street
Syracuse, New York 13261-7367
(315) 234-8545

1 (In chambers, counsel present by telephone. Time
2 noted: 1:26 p.m.)

3 THE COURT: I have before me a request for a judicial
4 review of an adverse determination by the Acting Commissioner
5 under 42 U.S.C. Section 405(g). The background is as follows:
6 The plaintiff was born in June of 1982 and is currently 36 years
7 old. She was 30 years old at the onset of her alleged
8 disability. She has a Bachelor's degree and worked until
9 May 10, 2013, the date of disability, and was unable to return
10 to full-time work until January 15, 2017. Her past jobs have
11 included front desk clerk, home attendant, and caseworker.

12 In her application for benefits, she indicated she
13 has bipolar disorder, depression, panic disorder, and
14 posttraumatic stress disorder. Procedurally, for purposes of
15 this matter, the plaintiff filed for Title II benefits on
16 April 14, 2015. As noted, she alleged an onset date of
17 disability beginning May 10, 2013.

18 A hearing was conducted by Administrative Law Judge
19 Kenneth Theurer on August 28, 2017, where plaintiff testified,
20 as did a vocational expert. At the hearing, the plaintiff
21 requested a closed period of disability from May 10, 2013, to
22 January 15, 2017.

23 The ALJ issued a decision on October 17, 2017,
24 finding that plaintiff was not disabled during the relevant
25 time. The Social Security Administration made that a final

1 determination of the agency by the Appeals Council's denial of
2 plaintiff's request for a review dated March 1, 2018. This
3 District Court action followed.

4 The ALJ applied the required five-step sequential
5 test for determining disability. At step one, he found
6 plaintiff had not engaged in substantial gainful activity during
7 the closed period from the alleged onset date through
8 January 15, 2017.

9 At step two, he concluded plaintiff suffers from the
10 severe conditions of anxiety and depression.

11 At step three, the ALJ concluded that plaintiff's
12 conditions do not meet or medically equal any of the listed
13 presumptively disabling conditions, considering several listings
14 in the mental health disorders category. Then after a review of
15 the record evidence, the ALJ determined plaintiff is capable of
16 performing a full range of work at all exertional levels with
17 several additional nonexertional mental limitations.

18 At step four, the ALJ concluded plaintiff is unable
19 to perform any past relevant work.

20 And step five, the ALJ applied the Medical-Vocational
21 Guidelines, as well as obtained testimony from a vocational
22 expert and concluded that plaintiff was not disabled.

23 As relevant to the time period in question, the
24 plaintiff treated with her primary care provider, Family Nurse
25 Practitioner Amy Lord at the United Health Services Primary Care

1 Newark Valley Clinic. She also received treatment at the
2 Outpatient Mental Health Clinic at Binghamton General Hospital
3 and through the Psychological Clinic at Binghamton University by
4 clinical therapist trainee Cailee Wiseman.

5 I've reviewed the record carefully, and in light of
6 the arguments of counsel and what counsel have presented in
7 their briefs, I've applied the requisite deferential standard
8 which requires me to determine whether correct legal principles
9 were applied and whether the result is supported by substantial
10 evidence. I'll turn first to the ALJ's determination of
11 plaintiff's residual functional capacity, or RFC.

12 Plaintiff argues that the ALJ improperly relied on
13 plaintiff's activities of daily living, or ADLs, and improperly
14 analyzed the opinion evidence. Regarding the opinion evidence,
15 plaintiff argues the ALJ gave too much weight to the opinion of
16 Dr. Lieber-Diaz, a non-examining consultant, and not enough
17 weight to the opinions of Dr. Slowik, an examining consultant,
18 and treating mental health providers Wiseman and Dr. Geller.
19 Plaintiff also argues the ALJ did not properly assess
20 limitations regarding plaintiff's ability to maintain a viable
21 work pace and attendance.

22 I've done a thorough and searching review of the
23 record and find that the RFC is supported by substantial
24 evidence. The ALJ thoroughly discussed the medical evidence and
25 other evidence of record, formulated the RFC based upon an

1 assessment of all of the medical and nonmedical evidence as a
2 whole for the relevant time period, and thoroughly explained his
3 analysis in arriving at the RFC.

4 The ALJ's decision shows he considered treatment
5 records for the relevant period and noted plaintiff did not
6 allege, nor did the record support, that she had any physical
7 limitations such that she was capable of performing work at all
8 exertional levels. As for her mental status, plaintiff was
9 treated at Binghamton General Hospital's Outpatient Mental
10 Health Clinic between December of 2013 and approximately March
11 of 2015 when she cancelled an appointment and did not respond to
12 outreach such that she was discharged against medical advice.

13 On admission, nevertheless, the mental status exam
14 showed her to have a pleasant attitude, her behavior was
15 appropriate, her speech was clear and normal, her thoughts were
16 coherent, logical and reality-based, and she had fair
17 concentration, cognitive functioning, insight, attention, and
18 judgment. Her mood was noted to be depressed and anxious, but
19 appropriate. She was also noted to be collecting unemployment
20 in December of 2013.

21 On discharge in March of 2015, she was diagnosed as
22 having moderate symptoms and moderate difficulty in social,
23 occupational, or school functioning. Between April 2014 and
24 February 2017, plaintiff treated with primary care provider --
25 mainly Nurse Practitioner Lord. While on several of the overall

1 office visits she complained of anxiety, depression, and
2 fatigue, nearly all of her mental status exams noted during the
3 encounters were normal with plaintiff having an appropriate
4 mood, affect, and behavior. She was oriented in all three
5 spheres. Her memory was charted as normal.

6 In the July and August visits in 2015, she was noted
7 to cry frequently and be depressed, but still her mental status
8 exams were normal. In December 2016, she was noted as depressed
9 and sad, but she was also noted to be stable and her mental
10 status exam regarding her mood and affect was normal.

11 Plaintiff's treatment with clinical psychology
12 trainee Wiseman at Binghamton University Psychological Clinic
13 consisted of several individual counseling sessions during the
14 closed period. She also had additional sessions beyond the
15 closed period and she apparently attended couples counseling
16 there with her husband.

17 While she was noted to have symptoms of major
18 depressive disorder and anxiety, the mental status exams in the
19 notes indicated she was well groomed, cooperative, oriented with
20 normal speech, intact thought processes, and normal thought
21 content. Her mood was noted to be mildly depressed, but
22 euthymic.

23 In June 2016, her activities had increased at home
24 and she was co-leader of her daughter's Girl Scout troop and was
25 involved in the PTA at her daughter's school and she was going

1 to begin working from home for a book consultant. Her affect
2 was neutral, calm, and appropriate.

3 A source statement from Wiseman covering the period
4 of July 2015 to February 2017 noted plaintiff had medium
5 limitations with concentration and persistence, interaction with
6 others, and stress. Wiseman opined plaintiff would be off task
7 between 15 and 20 percent during a normal workday and she would
8 be absent 3 or more days per month.

9 In a letter dated August 7, 2017, signed by Wiseman
10 and countersigned by Clinic Director Marilyn Geller, Ph.D.,
11 Wiseman stated that from July 7, '15, until mid-January 2017,
12 quote, "I believe it would have been difficult for her to work
13 on a consistent basis," based upon major depressive episodes and
14 panic attacks during that time period.

15 The plaintiff was examined by consultant Dr. Slowik
16 on July 6, 2015, just before she began seeing Dr. -- excuse me,
17 Wiseman. Plaintiff reported symptoms of difficulty with sleep
18 and appetite, a depressed mood, anxiety, panic attacks, and fear
19 of being in public. However, her mental status exams revealed
20 that she was cooperative and her social skills were adequate.

21 Her appearance, motor behavior, and eye contact were
22 all normal. Her speech was fluent and clear and her expressive
23 and receptive languages were adequate. Her thought processes
24 were coherent and goal directed. Her affect was full and
25 appropriate. Her sensorium was clear. Her attention and

1 concentration were intact. Her cognitive functioning was
2 average and she had good insight and judgement. However, she
3 was oriented in two of the three spheres. Her memory was
4 moderately impaired and her mood was anxious and dysthymic.

5 Dr. Slowik opined plaintiff was not limited in
6 understanding simple instructions and directions, not limited in
7 performing simple tasks independently, not limited in
8 maintaining concentration and attention, not limited in learning
9 new tasks and not limited in making appropriate decisions. Dr.
10 Slowik further opined that plaintiff was marked limited in
11 maintaining a regular schedule, in relating to others, and
12 appropriately dealing with stress. Her ability to perform
13 complex tasks independently was moderately to markedly limited
14 according to Dr. Slowik.

15 The state agency's psychological consultant, Dr.
16 Lieber-Diaz, after a review the record evidence, determined
17 plaintiff was moderately limited in understanding and
18 remembering detailed instructions, but otherwise her
19 understanding and memory limitations were not significantly
20 limited. Dr. Lieber-Diaz also noted plaintiff was moderately
21 limited in maintaining attention and concentration for extended
22 periods and in maintaining regular attendance and performing
23 activities within a schedule and in completing a normal workday
24 and workweek without psychological interruptions, but she was
25 otherwise not significantly limited regarding sustained

1 concentration and persistence.

2 As for social interaction, plaintiff was moderately
3 limited in interacting with the public, responding appropriately
4 to criticism, and getting along with coworkers. She was not
5 significantly limited in other areas of social interaction. In
6 adaptive limitation, she was moderately limited in responding
7 appropriately to changes in the work setting and in
8 realistically setting goals or making plans. Dr. Lieber-Diaz
9 concluded that plaintiff would be able to do simple work on a
10 sustained basis within a setting that has limited interaction
11 with the general public.

12 Based upon the treatment during the relevant period
13 and the other nonmedical evidence of record, the ALJ found
14 plaintiff capable of work at all exertional levels and limited
15 her to simple tasks with simple instructions and directions,
16 simple stress and simple decisionmaking in a stable working
17 environment. He found she could regularly attend to routine and
18 maintain a schedule. He limited her to being able to interact
19 with others for simple tasks and instructions, but should avoid
20 complex interaction with joint efforts and only have incidental
21 contact with the public.

22 I find all of the treatment outlined above was
23 thoroughly reviewed by the ALJ and the records provide clear and
24 substantial evidence to support the RFC determination such that
25 meaningful judicial review is possible. Only when the reviewing

1 court is unable to fathom the ALJ's rationale in relation to the
2 evidence in the record would remand be appropriate for further
3 findings or clearer explanation for the decision. Thus, the
4 relevant inquiry is whether the ALJ applied the correct legal
5 standards and whether determination is supported by substantial
6 evidence. Here, I find the ALJ's analysis regarding plaintiff's
7 functional limitations and restrictions affords an adequate
8 basis for meaningful judicial review, applies the proper
9 standards, and is supported by substantial evidence such that
10 additional analysis would be unnecessary or superfluous.

11 Turning specifically to plaintiff's arguments that
12 the ALJ did not properly weigh the opinion evidence, I find that
13 argument unconvincing. With regard to the ALJ giving great
14 weight to Dr. Lieber-Diaz's opinion, I find the ALJ properly
15 assessed the opinion and gave good reasons for crediting the
16 limitations suggested therein. The ALJ is entitled to rely on
17 the programmatic expertise of Dr. Lieber-Diaz and her opinion is
18 consistent with the plaintiff's mental status exams throughout
19 the record to the date of Dr. Lieber-Diaz's opinion in July of
20 2015.

21 As noted above, the mental status exams at that time
22 in the Wiseman notes indicate plaintiff was well groomed,
23 cooperative, oriented with normal speech, intact thought
24 processes, and normal thought content. Her mood was noted to be
25 mildly depressed but euthymic. Her short-term memory was good.

1 The mental exam by Dr. Slowik in July of 2015 was
2 normal except plaintiff was oriented in two spheres, her memory
3 was moderately impaired, and her mood was anxious and dysthymic.
4 Treatment records from Binghamton General Hospital's Outpatient
5 Clinic before July of 2015 showed plaintiff's mental status to
6 be normal except that she was depressed and anxious.

7 While depression and anxiety were also noted in the
8 primary care provider's notes, plaintiff's mental status exams
9 by Nurse Practitioner Lord from April 2014 up through July 2015
10 showed normal mood and affect, appropriate behavior, normal
11 memory, and oriented in all three spheres. Therefore, I find
12 Dr. Lieber-Diaz's opinion that plaintiff could regularly attend
13 to a routine and maintain a schedule in a low contact, low
14 stress environment is supported by substantial evidence in the
15 record and was properly explained. The opinions of state agency
16 non-examining sources can be given great weight when supported
17 by medical evidence in the record and the RFC may not need --
18 excuse me, and the RFC need not track any one specific opinion
19 in the record.

20 Further, plaintiff's activities of daily living also
21 support the RFC. During the relevant time period, she was
22 co-leader of her daughter's Girl Scout troop and had been
23 nominated to be treasurer of the PTA at her daughter's school.
24 She regularly visited her daughter's school once or twice a
25 week. She was able to do some cooking, shopping, and cleaning.

1 She visited with family and friends and regularly spent time
2 with her mother, who, for part of the period of disability
3 claimed, lived 20 miles away from plaintiff.

4 I also find that the weight given to the opinion of
5 Dr. Slowik was supported by the evidence and properly explained.
6 The ALJ gave partial weight to her opinion, accepting the
7 portion of the opinion consistent with the record as a whole,
8 including other treatment notes, which I have outlined, and her
9 activities of daily living and which were consistent with her
10 findings on examination of the plaintiff. The ALJ properly did
11 not accept the portion of her opinion that was not supported by
12 a record or Dr. Slowik's own examination of the plaintiff,
13 including the marked limitations Dr. Slowik found with regard to
14 plaintiff's ability to regularly maintain a schedule, in
15 relating to others, and in appropriately dealing with stress.

16 These restrictions were undermined by other treatment
17 notes in the record, as well, and Dr. Slowik's own mental status
18 exam where she noted plaintiff was cooperative and had adequate
19 social skills, she found plaintiff had normal appearance, motor
20 behavior, eye contact, and plaintiff's thought processes were
21 coherent and goal directed. Plaintiff's affect was normal and
22 her attention and concentration were intact according to Dr.
23 Slowik. She found plaintiff's cognitive functioning was average
24 and she had good insight and judgment.

25 I also find no error because although Dr. Slowik

1 opined marked limitations in some areas of functioning, such
2 marked limitations do not preclude the ability to do
3 work-related activities, especially because the ALJ limited
4 plaintiff to simple work tasks with simple stress and incidental
5 contact with the public and limited interaction with others and
6 completing simple work-related tasks.

7 I also find no error in the ALJ giving only partial
8 weight to the source statement of clinical psychology trainee
9 Wiseman. First, Wiseman is not a proper medical source and the
10 opinion in the check the box form dated August 7, 2017, is not
11 countersigned by any other mental health professional. Second,
12 Wiseman's opinions on plaintiff's limitations were inconsistent
13 with her own mental status evaluations of plaintiff and lack
14 support in other treatment notes included in the overall medical
15 record and other nonmedical evidence during the relevant time
16 period.

17 The ALJ also considered the narrative letter of
18 Wiseman dated August 7, 2017, that was countersigned by Dr.
19 Geller and properly rejected the opinions therein because the
20 opinion that plaintiff could not work went to the ultimate
21 determination of disability that is reserved to the Commissioner
22 and because Dr. Geller never actually treated plaintiff.
23 Further, Wiseman's statements that plaintiff would be off task
24 and absent were inconsistent with Wiseman's own treatment notes
25 and plaintiff's activities of daily living, as outlined already,

1 showing the plaintiff could do some household chores and
2 cooking, participate in activities with her daughter, and engage
3 in other recreational activities with her family.

4 Thus, I find the ALJ properly evaluated the opinion
5 evidence and gave good reasons for the weight given to each of
6 the opinions. I find the ALJ properly explained the reasons for
7 the RFC. In light of the foregoing, and considering the entire
8 record and the ALJ's determination, I find that the ALJ applied
9 the appropriate legal standards of review in determining
10 plaintiff's RFC and the RFC is supported by substantial
11 evidence.

12 Regarding plaintiff's step five argument, I find that
13 to be without merit since I have found the RFC to be supported
14 by substantial evidence and since the vocational expert's
15 testimony was based upon a hypothetical that was the same as the
16 RFC, the ALJ properly relied on the vocational expert's
17 testimony that plaintiff could perform jobs that exist in
18 significant numbers in the national economy. The RFC, which I
19 have found properly supported and determined, simply does not
20 indicate that plaintiff would be off task 10 to 12 percent of
21 the workday or that she would miss more than one unscheduled
22 absence per month. Therefore, the Commissioner met the burden
23 at step five and correctly determined plaintiff was not
24 disabled.

25 So I grant defendant's motion for judgement on the

1 pleadings and will enter a judgement dismissing plaintiff's
2 complaint in this action. A copy of the transcript of my
3 decision will be attached to the order should any appeal be
4 taken from my determination.

5 (Time noted: 1:45 p.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, HANNAH F. CAVANAUGH, RPR, CSR, Official U.S. Court Reporter, in and for the United States District Court for the Northern District of New York, DO HEREBY CERTIFY that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 24th day of May, 2018.

x Hannah F. Cavanaugh

HANNAH F. CAVANAUGH, RPR, CSR, NYACR

Official U.S. Court Reporter